CANADA / JUDGMENT

Garcia Transport Ltée v. Royal Trust Co.

[1992] 2 SCR 499

COURT
Supreme Court of Canada

DECIDED
25 June 1992

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Garcia Transport Ltée v. Royal Trust Co.

Collection

Supreme Court Judgments

Date

1992-06-25

Report

[1992] 2 SCR 499

Case number

21935

Judges

Lamer, Antonio; La Forest, Gérard V.; L'Heureux-Dubé, Claire; Gonthier, Charles Doherty; Stevenson, William

On appeal from

Quebec

Subjects

Action

Civil law

Civil procedure

Notes

SCC Case Information: 21935

Decision Content

Garcia Transport Ltée v. Royal Trust Co., [1992] 2 S.C.R. 499

Royal Trust Company

and

Federal Business Development Bank Appellants

v.

Garcia Transport Ltée Respondent

and

The Registrar for the division of

Laprairie and the Sheriff for the

district of Montreal Mis en cause

Indexed as: Garcia Transport Ltée v. Royal Trust Co.

File No.: 21935.

1992: February 25; 1992: June 25.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Gonthier and Stevenson* JJ.

on appeal from the court of appeal for quebec

Obligations -- Extinction of obligations -- Discharge of certain debtors -- Public order -- Waiver -- Debtor waiving rights conferred by arts. 1202a et seq. C.C.L.C. before sheriff's sale took place -- Whether arts. 1202a et seq. C.C.L.C. public order legislation -- If so, whether debtor's waiver valid -- Civil Code of Lower Canada, arts. 1202a to 1202l.

Obligations -- Extinction of obligations -- Discharge of certain debtors -- Requirements -- Articles 1202a et seq. C.C.L.C. -- Debtor's hypothecated lots adjudged to creditor in two separate sheriff's sales -- Three-month period between sales -- First sale sufficient to satisfy debtor's debt to creditor -- Debtor's motion to be discharged made after second sale took place -- Whether debtor entitled to be discharged after first sheriff's sale -- Whether second sheriff's sale can be vacated -- Civil Code of Lower Canada, arts. 1202a to 1202l.

Civil procedure -- Vacating of sheriff's sale -- Requirements -- Code of Civil Procedure, R.S.Q., c. C-25, arts. 698, 699, 700.

Judgments and orders -- Res judicata -- Preliminary exception -- Motion to dismiss -- Superior Court granting creditor's preliminary motion in part and striking conclusions in debtor's action relating to vacating of sheriff's sale -- No appeal from judgment within prescribed time -- Whether judgment constitutes res judicata -- Civil Code of Lower Canada, art. 1241.

Royal Trust Co. acted as a trustee on behalf of the Federal Business Development Bank, which lent $250,000 to the respondent. The loan was secured by a hypothec on three lots. When the respondent defaulted on its payments, the appellants took action for the balance remaining on the loan, obtained judgment and seized the hypothecated lots. The parties then entered into an agreement: the respondent waived its right to obtain its discharge under arts. 1202a et seq. C.C.L.C., whatever the price obtained for the lots at the sheriff's sales or the real value of the property; in return, the appellants agreed to initiate a second sale to auction the third lot only if the proceeds from the sale of the two undeveloped lots were insufficient to satisfy their judgment against the respondent. At the first sale, the appellants acquired the first two lots, and three months later, at the second sale, successfully bid for the third one. After the second sale was held, the respondent instituted an action against the appellants, alleging that it was entitled to its discharge under art. 1202b C.C.L.C. on the basis that the immoveables sold at the first sheriff's sale had a value superior to its debt towards the appellants. The respondent also requested that the second sale be vacated.

In a preliminary motion, the appellants argued that arts. 698 and 699 C.C.P. provided the only basis on which a sheriff's sale could be set aside, and that the respondent had not alleged facts supporting the vacating of the second sale pursuant to these provisions. The Superior Court granted the appellants' motion in part, striking those conclusions in the respondent's action concerning the vacating of the second sale. The respondent did not appeal this ruling and the case proceeded to trial, where the court dismissed the respondent's action for discharge on the ground that the real value of the properties sold at the first sale was insufficient to satisfy the debt owed to the appellants.

The majority of the Court of Appeal allowed the respondent's appeal. The majority found that the Superior Court had underestimated the value of the first two lots and that the amount was sufficient to satisfy the respondent's debt. With respect to the respondent's waiver of the discharge, the majority held that one cannot renounce rights conferred by legislation of public order before they are acquired, and concluded that the waiver was void since the debtor signed it before its right to claim its discharge had materialized, and that it was now at liberty to seek the vacating of the second sheriff's sale.

This appeal is to determine whether the respondent is entitled to a discharge after the first sheriff's sale and whether the second sheriff's sale should be vacated.

Held: The appeal should be allowed.

Articles 1202a et seq. C.C.L.C. constitute a law of economic protective public order. These provisions, which provide for the discharge of the debtor upon a sale at law and adjudication to the creditor of the immoveable which guarantees the debt, were intended not only to protect a limited group, but also to promote the economic health of society in general. If they were merely facultative, these provisions could not achieve the purpose of the law: a waiver of their benefit would quickly become a standard clause in every loan contract in Quebec. The absence of a specific reference by the legislator is not an obstacle to a judicial finding that the provisions were

enacted for public order.

The party in whose favour the public order legislation has been enacted may waive the benefit of such legislation since its breach results in relative nullity only. A valid waiver, however, can only be given after that party has acquired the right created under the legislation. It is only then that the weaker party can make an enlightened choice between the protection afforded by the law, and some advantage that it may derive from the other party in exchange for its waiver of that protection. Here, the respondent waived the protection of arts. 1202a et seq. C.C.L.C. after it had defaulted and judgment on the balance of its debt had been rendered against it. At that time, it had not yet acquired the right to ask for its discharge because this right arises only after a sheriff's sale has taken place. The respondent's waiver, signed before any sale had taken place, was thus premature and, given that the discharge provisions were of public order, is null. Since the appellants did not challenge the Court of Appeal's finding that the value of the property sold at the first sheriff's sale was sufficient to satisfy the judgment in its totality, the respondent had grounds to seek its discharge based on the value of the property sold.

While arts. 1202a et seq. C.C.L.C. are remedial provisions which must be afforded a large and liberal interpretation, the right to be discharged is not an absolute right. The debtor must exercise the right, must do so in a timely fashion, and must follow the proper procedure. In light of art. 1202i, a debtor who has hypothecated more than one piece of land to secure a single loan must take positive steps to obtain a discharge after a first sale at law, in order to prevent its creditor from enforcing its rights with respect to other securities associated with the same debt, even when the value of a property sold at a first sheriff's sale was sufficient to satisfy the balance of the debt owing to its creditor. The debtor must act diligently. If it stands idly by while other legal proceedings take place, courts will not remedy this inaction. Besides, art. 1202k is a clear indication that once the judgment has been fully executed, as here by the second sale at law, although the debtor can still obtain its discharge (provided the value of the property is sufficient to cover the debt), it cannot claim the amount which may have been a windfall to the creditor and to which it may otherwise have been entitled. Here, the respondent's claim for a discharge after the first sheriff's sale must fail. The respondent could have prevented, or at least delayed, the second sheriff's sale simply by following the procedure set out in art. 1202j C.C.L.C. Since it failed to claim its discharge before the second sale took place, the respondent was barred both from seeking its discharge and obtaining reimbursement from the appellants. Its failure to observe the procedural requirements to avail itself of its rights was fatal.

The respondent is also barred from claiming the vacating of the second sheriff's sale. Given the role of sheriff's sales in the execution of judgments, the rights conferred by them, and the necessity of guaranteeing the stability and certainty of titles, these sales are generally final and binding. It is only exceptionally, and on the very limited grounds set out in arts. 698 and 699 C.C.P., that they can be set aside. A demand to vacate a sheriff's sale must be made within the short time period prescribed by art. 700 C.C.P. This delay is peremptory. Petitioners who could have opposed the seizure and sale, but who failed to do so, generally do not succeed in having a sheriff's sale set aside because their failure to act earlier implies that they consented to whatever

irregularity they might later invoke. In this case, there is no ground for attacking either the validity of the judgment originally obtained by the appellants or the second sheriff's sale. The respondent never denied that it owed the amount claimed by the appellants after it defaulted on its payments and it did not initiate any proceeding to be discharged from its debt to the appellants before the second sheriff's sale took place. The appellants seized the property, as they were entitled to do, and the second sheriff's sale proceeded legally. While the respondent may have been within the time period prescribed by art. 700 when it initiated its action, it did not allege any of the grounds set out in the Code of Civil Procedure which would support the vacating of the second sheriff's sale. In allowing the appellants' preliminary motion, the Superior Court found that neither fraud nor the non-observance of essential conditions and formalities with respect to the second sale had been made out. Consequently, the respondent's demand that the second sheriff's sale be vacated must be denied. Its claim did not fall within the strict provisions of the Code of Civil Procedure.

In any event, since the Superior Court's decision granting the appellants' preliminary motion to strike part of the respondent's action concerning the vacating of the second sheriff's sale constituted a final judgment on the point and was not appealed within the prescribed time period, either independently or within the context of the appeal from the decision on the merits, that judgment constituted res judicata. Accordingly, the respondent could not then relitigate the matter and seek, as it did on appeal, the vacating of the second sheriff's sale, even if it may have had the right to succeed on that claim.

Cases Cited

Referred to: Placements Racine Inc. v. Trust général du Canada, [1989] R.J.Q. 2287; Pauzé v. Gauvin, [1954] S.C.R. 15; Landry v. Cunial, [1977] C.A. 501; Pouliot v. Cie Trust Royal, [1980] C.A. 157; Belgo-Fisher (Canada) Inc. v. Lindsay, [1988] R.J.Q. 1223; Stern v. G.S.A. Management Inc., C.A. Montreal, No. 500-09-000485-813, December 19, 1983; In re Réserves du Nord (1973) Ltée: Biega v. Druker, [1982] C.A. 181; Girard v. Groupe Desjardins assurances générales, [1989] R.R.A. 153; Pomerleau v. 2319-8419 Québec Inc., [1989] R.J.Q. 137; Gélinas v. Caisse populaire de St-Sévère, [1990] R.R.A. 566; Letellier v. Century 21 Citadelle Ltée, [1990] R.D.I. 42; Bérard v. Barrette (1874), 5 R.L. 703; Lymburner v. Courtois (1922), 34 Que. K.B. 341; Patton v. Morin (1865), 16 L.C.R. 267; Perrault v. Mousseau (1896), 6 Que. Q.B. 474; Dyer v. Bradbury-Parry, [1976] C.A. 106; Boileau v. Procureur général du Québec, [1957] S.C.R. 463; Town of Anjou v. C.A.C. Realty Ltd., [1978] 1 S.C.R. 819, aff'g [1974] C.A. 197, aff'g [1972] C.S. 808; St-Gelais v. Banque de Montréal, [1968] S.C.R. 183, aff'g [1966] B.R. 365; Gobeil v. Cie H. Fortier, [1982] 1 S.C.R. 988; Canada Investment and Agency Co. v. McGregor (1892), 1 Que. Q.B. 197, aff'd (1892), 21 S.C.R. 499; Genier v. Kerr (1893), 3 C.S. 409; Veilleux v. B. Trudel et Cie (1933), 55 Que. K.B. 481; Leclerc v. Phillips (1894), 4 Que. Q.B. 288; Roy v. Lavallée, [1960] Que. Q.B. 438; Office du crédit agricole du Québec v. Gauvin, [1977] C.S. 589, aff'd C.A. Quebec, No. 200-09-000306-77, August 12, 1977; Fort Garry Trust Co. v. Roberts Sprinkler Ltd., [1981] C.S. 905; Janelle v. Champagne, [1981] C.S. 898; Caisse populaire de St-Eustache v. Entreprises Blainville Ltée, [1989] R.D.I. 355; Dufresne v. Dixon (1889), 16 S.C.R. 596; Vézina v. Lafortune (1917), 56 S.C.R. 246; Peiffer v. Lafrance, [1987] R.J.Q. 2616;

Roberge v. Bolduc, [1991] 1 S.C.R. 374; Davis v. Royal Trust Co., [1932] S.C.R. 203; Dominion Textile Co. v. Skaife, [1926] S.C.R. 310; Ville de St. Jean v. Molleur (1908), 40 S.C.R. 139; Fraternité des Policiers de la Communauté urbaine de Montréal v. City of Montreal, [1980] 1 S.C.R. 740; Brandt Plumbing Co. v. Nozetz, [1984] R.D.J. 219; Laforge v. White, [1990] R.J.Q. 2124; Placements Monga Inc. v. Lalonde, [1986] R.L. 264; Interprovincial Building Credits Ltd. v. Pelletier, [1970] C.S. 94; Lafaille v. Banque nationale du Canada, [1987] R.J.Q. 1509; Labine v. Viau, [1942] Que. K.B. 406; Ocean Accident & Guarantee Corp. v. Air Canada, [1975] R.P. 193; Venne v. Quebec (Commission de protection du territoire agricole), [1989] 1 S.C.R. 880; Mongrain v. Auger, [1967] Que. Q.B. 332; Brousseau v. Hamel, [1968] Que. Q.B. 129; Martel v. Martel, [1967] Que. Q.B. 805.

Statutes and Regulations Cited

Act respecting the release of certain debtors, S.Q. 1938, c. 90.

Act to amend the Civil Code, S.Q. 1947, c. 71.

Civil Code of Lower Canada, arts. 13, 1040a to 1040e, 1202a to 1202l, 1241.

Civil Code of Québec, S.Q. 1991, c. 64 [not yet in force], arts. 1417 to 1421, 1695 to 1698.

Code of Civil Procedure, R.S.Q., c. C-25, arts. 599, 695, 696, 698, 699, 700.

Authors Cited

Azard, Pierre. "Le contrat d'adhésion" (1960), 20 R. du B. 337.

Baudouin, Jean-Louis. Les obligations, 3e éd. Cowansville, Qué.: Éditions Yvon Blais Inc., 1989.

Carbonnier, Jean. Droit civil, t. 4, Les obligations, 15e éd. Paris: P.U.F., 1991.

Ciotola, Pierre. "Aperçu des conditions illicites et immorales" (1970), 72 R. du N. 315 et 407.

Coipel, Michel. "La liberté contractuelle et la conciliation optimale du juste et de l'utile" (1990), 24 R.J.T. 485.

Côté, Pierre-André. The Interpretation of Legislation in Canada, 2nd ed. Translated by Katherine Lippel, John Philpot and William Schabas. Cowansville, Que.: Éditions Yvon Blais Inc., 1991.

Couturier, Gérard. "L'ordre public de protection, heurs et malheurs d'une vieille notion neuve". Dans Études offertes à Jacques Flour. Paris: Répertoire du notariat defrénois, 1979, 95.

Crépeau, Paul-André. "Contrat d'adhésion et contrat type". Dans Adrian Popovici, dir., Problèmes de droit contemporain (Mélanges Louis Baudouin). Montréal: Presses de l'Université de Montréal, 1974, 67.

Ducharme, Léo. Précis de la preuve, 3e éd. Montréal: Wilson & Lafleur, 1986.

Farjat, Gérard. L'ordre public économique. Paris: L.G.D.J., 1963.

Ghestin, Jacques. Le contrat dans le nouveau droit québécois et en droit français: principes directeurs, consentement, cause et objet. Montréal: Institut de droit comparé, 1982.

Ghestin, Jacques. Traité de droit civil, t. 2, Les obligations -- Le contrat: formation, 2e éd. Paris: L.G.D.J., 1988.

Josserand, Louis. "Aperçu général des tendances actuelles de la théorie des contrats" (1937), 36 Rev. trim. dr. civ. 1.

Jukier, Rosalie. "Banque Nationale du Canada v. Houle (S.C.C.): Implications of an Expanded Doctrine of Abuse of Rights in Civilian Contract Law" (1992), 37 McGill L.J. 221.

Juris-classeur civil, Art. 6, fasc. 1 et 2, par Maurice Gégout.

LeBel, Louis. "L'appel des jugements interlocutoires en procédure civile québécoise" (1986), 17 R.G.D. 391.

Marler, William deMontmollin. The Law of Real Property. Toronto: Burroughs & Co., 1932.

Perrault, Antonio. "Ordre public et bonnes moeurs" (1949), 9 R. du B. 1.

Pineau, Jean et Danielle Burman. Théorie des obligations, 2e éd. Montréal: Thémis, 1988.

Popovici, Adrian. "Les contrats d'adhésion: un problème dépassé". Dans Adrian Popovici, dir., Problèmes de droit contemporain (Mélanges Louis Baudouin). Montréal: Presses de l'Université de Montréal, 1974, 161.

Quebec. Civil Code Revision Office. Report on the Québec Civil Code: Draft Civil Code, vol. I. Québec: Éditeur officiel, 1978.

Ripert, Georges. "L'ordre public et la liberté contractuelle". Dans Mélanges François Gény. Paris, 1936.

Royer, Jean-Claude. La preuve civile. Cowansville, Qué.: Éditions Yvon Blais Inc., 1987.

Tancelin, Maurice. Des obligations: contrat et responsabilité, 4e éd. Montréal: Wilson & Lafleur, 1988.

Traité de droit civil du Québec, t. 8 bis, par Léon Faribault. Montréal: Wilson & Lafleur, 1959.

Trudel, Gérard. "Des frontières de la liberté contractuelle". Dans Adrian Popovici, dir., Problèmes de droit contemporain (Mélanges Louis Baudouin). Montréal: Presses de l'Université de Montréal, 1974, 217.

APPEAL from a judgment of the Quebec Court of Appeal, [1990] R.J.Q. 925, [1990] R.D.I. 285, setting aside a judgment of the Superior Court. Appeal allowed.

Gabriel Kordovi and Pierre de Granpré, Q.C., for the appellants.

Benoit Rivet, for the respondent.

//L'Heureux-Dubé J.//

The judgment of the Court was delivered by

L'Heureux-Dubé J. -- This appeal concerns the application of those provisions of the Civil Code of Lower Canada which provide for the discharge of a debtor upon a sale at law and adjudication to a creditor of an immoveable which guarantees a debt (arts. 1202a to 1202l C.C.L.C. (hereinafter "arts. 1202a et seq. C.C.L.C.")).

Specifically, the issue is whether the respondent, on the facts of this case, could have availed itself of these provisions. In order to answer that question, the nature of the provisions of arts. 1202a et seq. C.C.L.C. will have to be examined as will the procedural requirements associated with them.

Relevant Legislation

Selected provisions of Section VIII, Chapter 8 of the Civil Code of Lower Canada, entitled "Of the Discharge of Certain Debtors" read as follows:

1202a. In this section,

a. "claim" includes the principal, interest, law costs taxed against the debtor and those which have been effected in the common interest;

b. "immoveable" includes one or more immoveables;

c. "value", applied to any immoveable or property whatsoever, means its fair yielding, investment or commercial value in times of normal economic activity, regardless of its depreciation for the time being through a regional or general economic depression.

1202b. Whenever an immoveable has been sold at law and adjudged to the creditor of a debt guaranteed by privilege or hypothec upon such immoveable, the debtor has the right to obtain his release as regards this creditor, with respect to such debt or, as the case may be, with respect to any residue of such debt, and with respect to any judgment in connection therewith, in the following cases:

a. When the immoveable, at the time of the adjudication, had a value at least equal to the total amount of the purchaser's claim and of every other hypothecary or privileged claim affecting the immoveable and ranking ahead of that of the purchaser;

b. When the purchaser has resold the immoveable, or part of the immoveable, for a price at least equal to the total amount of his claim, of the expenses incurred by the purchaser for the maintenance and the improvement of the immoveable with interest at the rate of five per cent per annum upon such expenditure, and of every other hypothecary or privileged claim affecting the immoveable and ranking ahead of that of the purchaser;

c. When, through any transaction or operation whatsoever respecting such immoveable, the purchaser has received or realized, in money or in property, a value at least equal to the total amount of his claim, of every other hypothecary or privileged claim affecting the immoveable and ranking ahead of that of the purchaser, and of the expenses of maintenance and improvement of the said immoveable or of any other immoveable received in exchange. [Emphasis added.]

1202d. In determining the amount of the claim, interest shall be calculated at a rate of five per cent per annum unless the agreement stipulates a lower rate and the sums exigible as penalties for the non-fulfilment of any obligation of the debtor shall be added to the interest.

However, when the total amount of the interest and of the penalties exceeds the amount with interest at a rate of five per cent per annum upon the principal and the costs would produce, such total amount shall be reduced accordingly.

1202e. When the claim is greater than the value of the immoveable at the time of the adjudication, than its resale price or than the value received or realized through transactions or operations respecting the immoveable, the debtor may nevertheless obtain his release by paying to the creditor the amount required to make up the difference.

1202i. The release of the principal debtor entails the release of his sureties and warrantors.

When a debtor has, in virtue of this division, the right to obtain his release with respect to a debt or residue of debt, any person who has become surety or warrantor for the payment of such debt or such residue has the right to obtain his own release and may exercise his recourse for such purpose, independently of the principal debtor, by following the procedure hereinabove set forth.

1202j. The debtor may, in so far as his recourse for release is not prescribed, invoke as a defence to a suit, as an opposition to a seizure in execution or as a contestation of a seizure by garnishment, as the case may be, the grounds which he may invoke in support of an application for release, and, upon conclusions to that effect in the said defence, opposition or contestation, the court may award the release.

1202k. The release of the debtor shall not have the effect of compelling the creditor to remit any sums which he legally collected under his judgment before such release.

1202l. The application for release must, under pain of forfeiture, be instituted:

a. In the case of paragraph a of article 1202b, within the two years counting from the adjudication;

b. In the cases of paragraphs b and c of the said article, within the two years counting from the date when the right to release arose, but prior to the expiration of the five years following the adjudication.

From the sections entitled "Opposition to Seizure in Execution" and "Vacating of Sheriff's Sale", the following provisions of the Quebec Code of Civil Procedure, R.S.Q., c. C-25 ("C.C.P."), are also relevant:

599. The service of the opposition stays proceedings upon the execution; and the seizing officer must forthwith return it to the prothonotary who issued the writ, together with the writ itself and all proceedings thereon.

If, however, the opposition is founded on grounds which only go to reduce the amount claimed, or to withdraw from seizure a part of the property seized, the seizing officer is bound, unless a judge has ordered all proceedings to be stayed, to proceed with the execution in virtue of a copy, prepared by him, of the writ and of the minutes of seizure, either to satisfy the uncontested part of the claim, or to sell the property against which the opposition is not directed. [Emphasis added.]

698. A sheriff's sale may, at the instance of any interested person, be vacated:

(1) If, with the knowledge of the purchaser, fraud was employed to keep persons from bidding;

(2) If the essential conditions and formalities prescribed for the sale have not been observed; but the seizing creditor cannot vacate the sale for any irregularity attributable to himself or his attorney.

699. A sheriff's sale may also be vacated at the instance of the purchaser:

(1) If he is liable for eviction by reason of some real right from which the property is not discharged by the sale;

(2) If the immoveable differs so much from the description in the minutes of seizure that it is to be presumed that he would not have bought had he been aware of the true description.

700. The demand to vacate a sheriff's sale, which is a proceeding incidental to the execution, must be made by motion served on all the interested parties within ninety days of adjudication. This delay is peremptory; nevertheless, the court may, provided not more than six months have elapsed since the adjudication, relieve from the consequences of his default a party who shows that in fact it was impossible for him to act sooner. [Emphasis added.]

Facts

The respondent Garcia Transport Ltée ("Garcia") is a shipping and storage company. It operated its business in a building erected on one of three lots of land it had acquired from the town of Brossard. The other two lots remained vacant.

In 1975, the appellant Royal Trust Company acted as trustee on behalf of the Federal Business Development Bank (hereinafter referred to, along with Royal Trust Company, as "the Bank"), which lent $250,000 to Garcia. The loan was secured by a hypothec on the three lots owned by Garcia.

In 1983, after Garcia defaulted on its payments, the Bank took action for the balance remaining on the loan and, in January 1984, obtained judgment for $151,238.97 with interest at the rate of 21.75% from July 24, 1983, plus costs. The Bank then seized all three of the lots hypothecated by Garcia to secure the debt, for the purpose of selling them in a single sheriff's sale. Before the sale took place, however, apparently at the instigation of Garcia, the parties entered into a written agreement (hereinafter "the waiver") which reads as follows:

[translation]

AGREEMENT

GARCIA TRANSPORT LTÉE OF THE FIRST PART

ROYAL TRUST COMPANY OF THE SECOND PART

AND

FEDERAL DEVELOPMENT BANK

WHEREAS the ROYAL TRUST COMPANY in its capacity as trustee for the FEDERAL DEVELOPMENT BANK has obtained a judgment condemning GARCIA TRANSPORT LTÉE to pay the sum of $151,238.97 with interest at the rate of 21 3/4% per annum beginning on July 24, 1983, with costs;

WHEREAS the said judgment also declared the immoveables commonly known as lots 244-1, 245-1 and 43-1 of the official cadaster of the parish of Laprairie de la Madeleine, with the building constructed thereon, to be hypothecated;

WHEREAS GARCIA TRANSPORT LTÉE is asking the ROYAL TRUST COMPANY and the FEDERAL DEVELOPMENT BANK to begin by selling the two lots which are vacant and not developed, being lots 244-41 [sic] and 245-1, even if lot 43-1 with the building erected thereon together with all the immoveables by their destination are sold subsequently in the event that the adjudication price of the two lots is not sufficient to cover the claim;

ACCORDINGLY, THE PARTIES AGREE:

1. GARCIA TRANSPORT LTÉE declares that whatever the adjudication price may be, even if the ROYAL TRUST COMPANY or the FEDERAL DEVELOPMENT BANK are declared to be the vendors for setting the reserve price which is one quarter of the municipal assessment, the adjudication price shall be considered to be the market value of the immoveable by all the parties concerned;

2. GARCIA TRANSPORT LTÉE waives all recourse under articles 1202 et seq. of the Civil Code and declares and undertakes accordingly not to apply to be discharged from the balance of the claim owing to the ROYAL TRUST COMPANY or to the FEDERAL DEVELOPMENT BANK in the event that they are declared to be the vendors for any price whatsoever and even if the ROYAL TRUST COMPANY or the FEDERAL DEVELOPMENT BANK subsequently resells the said immoveables for a price greater than the adjudication price for which they acquire the immoveables at the sheriff's sale;

3. GARCIA TRANSPORT LTÉE acknowledges that immediately after the sheriff's sale of the two lots bearing numbers 244-41 [sic] and 245-1, if the adjudication price is less than the claim owing to the ROYAL TRUST COMPANY or to the FEDERAL DEVELOPMENT BANK, and regardless of the balance owing after deduction of the adjudication price, the ROYAL TRUST COMPANY or the FEDERAL DEVELOPMENT BANK shall be entitled to give new instructions to the sheriff to sell lot 43-1 with the building erected thereon and also with all the equipment listed in the judgment and declared to be immoveables by nature or by their destination, as the case may be;

May 10, 1984

GARCIA TRANSPORT LTÉE

In short, Garcia renounced its right to obtain its discharge under arts. 1202a et seq. C.C.L.C., whatever the price obtained for the lots at the sheriff's sales or the real value of the property. In return, the Bank agreed to conduct the sale in two stages, starting with the two undeveloped lots. If the proceeds from the sale of the properties at the first sale were insufficient to satisfy the judgment against Garcia, the Bank would initiate a second sale to auction the third lot.

At the first sale, which took place in September of 1984, the Bank acquired the first two lots for $25,000. At the second sale, held in December 1984, the Bank successfully bid for the third lot at a price of $133,055.40.

In February 1985, after the second sale was held, Garcia instituted an action against the Bank in the Quebec Superior Court. Garcia alleged that it was entitled to its discharge under art. 1202b C.C.L.C. on the basis that the immoveables sold at the first sheriff's sale had a value superior to its debt towards the Bank. Garcia also requested that the second sale be vacated and that all further proceedings against it be suspended.

Judgments

Superior Court (Denis Lévesque J.)

In a preliminary motion, the Bank argued that arts. 698 and 699 C.C.P. provided the only basis on which a sheriff's sale could be set aside, and that Garcia had not alleged facts supporting the vacating of the second sale according to these provisions. In a ruling in May of 1985 (as corrected July 9, 1985), the trial judge granted the Bank's preliminary motion in part, striking those conclusions in Garcia's action concerning the vacating of the second sale and the suspension of proceedings. Garcia did not appeal this ruling and the case proceeded to trial.

In February 1986, the Superior Court dismissed Garcia's action for discharge on the ground that the real value of the properties sold at the first sale was only $156,100, an amount insufficient to satisfy the debt owed to the Bank, which stood, with interest, at $174,400. Given that the Bank had conceded that Garcia's debt was extinct as a result of the second sale, the judge did not rule on the legality of Garcia's waiver of its rights under arts. 1202a et seq. C.C.L.C.

Court of Appeal, [1990] R.J.Q. 925 (Monet, Jacques and Vallerand JJ.A.)

For reasons rendered by Jacques J.A., a majority of the court allowed the appeal, Vallerand J.A. dissenting on the issues of waiver and res judicata.

After reviewing the facts, Jacques J.A. concluded that the trial judge had underestimated the value of the two lots sold at the first sheriff's sale. According to his calculations, the two lots were in fact worth $206,100, an amount sufficient to satisfy Garcia's debt to the Bank.

With respect to the Bank's argument that, given its waiver, Garcia could not ask for its discharge, Jacques J.A. held that arts. 1202a et seq. C.C.L.C. were provisions of public order. Being of the view that one cannot renounce rights conferred by legislation of public order before they are acquired, he concluded that the waiver was void since Garcia signed it before its right to claim its release had materialized. In his opinion, Garcia acquired that right only after the first sale was held. Accordingly, Jacques J.A. allowed the appeal, concluding that Garcia was now at liberty to seek the vacating of the second sheriff's sale.

Assuming without deciding that arts. 1202a et seq. C.C.L.C. might be dispositions of economic public order such that any waiver of them might be struck down, Vallerand J.A. disagreed with the majority on two points. First, Garcia had not waived its rights prematurely, since, in his view, the purpose of the legislation was only the protection of the weaker party at the time of the signing of the original contract of loan, and not once the debtor was in default (at p. 931):

[translation] In the case at bar, the appellant did not, in the original deed of loan, and thus at the time when it was in a position of "weakness" and "ready to sign . . . anything . . .", waive the protection of articles 1202a et seq. It was at that point, and only at that point, that the appellant was prohibited from so doing; if indeed it were prohibited from so doing, of course, on which point, however, I reserve my opinion.

Moreover, he was of the opinion that, by signing the waiver, Garcia had obtained a concession from the Bank (the splitting of the sales at law), and that courts should not interfere with a bargain freely concluded between the parties simply because the price obtained for the property at the first sheriff's sale may have been insufficient to satisfy Garcia's debt to the Bank (at p. 931):

[translation] The contractual waiver which concerns us and which is therefore not set out in the original deed of loan was agreed upon solely for the benefit of the "weak" party, the borrower in default. The creditor could have had the two immoveables jointly affected by the warranty sold all together; the debtor could not have complained of this. The creditor wanted first to sell only the undeveloped lots, in the hope that this would be sufficient to pay the debt and would thereby discharge the developed lots: it was simply being obliging. However, as may be well understood, the obliging creditor wanted to protect itself in the event that the debtor's hopes were not met, and it therefore required, in consideration, a waiver of the protection of article 1202j. As I have said, this waiver would be valid even if we assume that the law prohibited the waiver being given at the time of the original deed of loan; it is a fortiori valid, then, when mere judicial policy might intervene: I find that there is scarce evidence of the will of the legislator to prohibit the creditor from obliging in this way; quite the contrary.

Finally, in his opinion, since the trial judge's ruling on the Bank's preliminary motion had not been appealed, it constituted res judicata with which an appellate court could not interfere.

Analysis

The issues will be discussed in the following order:

1. The regime provided by arts. 1202a et seq. C.C.L.C.;
2. Public order;
3. The waiver;
4. Procedural requirements:

(a) vacating the second sheriff's sale;

(b) the discharge.

The Regime Provided by Arts. 1202a et seq. C.C.L.C.

Articles 1202a et seq. C.C.L.C. were originally enacted in a 1938 statute entitled An Act respecting the release of certain debtors, S.Q. 1938, c. 90, and adopted as Section VIII of the eighth chapter of the Civil Code of Lower Canada in 1947 by the Act to amend the Civil Code, S.Q. 1947, c. 71. In the Traité de droit civil du Québec (1959), vol. 8 bis, Léon Faribault describes the mischief that the legislation was intended to cure (at p. 639):

[translation] By adding this section to the code in 1947 . . . the legislature wished to put an end to an abuse which, as it spread, was threatening to become a genuine disaster. It often happened that after an hypothecary creditor had received payment by instalments of a large portion of its claim, it would refuse to give its debtor any additional time, when the residue owing was only quite small. It would obtain judgment against the debtor for the amount of the residue, and have the immoveable which was hypothecated to it seized and advertised for sale.

At the sale, it would purchase the immoveable for a song, generally for an amount lower than what was owing to it, and always for much less than its real value. Because it still had its judgment against the debtor for the portion of the debt which had not been paid by the adjudication price, it would exercise its recourse against the debtor's other property.

Frequently, it would succeed in reselling the immoveable at a much higher price than its adjudication price, and would thereby realize a significant profit at the expense of the debtor.

The consequence of this course of action was that the creditor was able to collect a rate of interest which was sometimes quite fabulous, at the expense of the debtor, who nonetheless had to pay the creditor the balance of its claim, with interest in addition.

This was the situation which the legislature wished to remedy by enacting the present section.

In Labine v. Viau, [1942] Que. K.B. 406, one of the first decisions dealing with the legislation, Bertrand J., sitting ad hoc, commented at p. 408:

[translation] The spirit of this legislation, which goes back to 1938, lies in the concern which is clearly reflected in its provisions with preventing the creditor of an hypothec on an immoveable from purchasing the immoveable itself for a sometimes minute fraction of its debt when the immoveable goes at sheriff's sale, and nonetheless continuing to be the creditor for all of the difference which was not satisfied or extinguished by the ranking of the creditor of the obligation on the proceeds, while at the same time becoming the owner of an immoveable the value of which covered the total amount of the debt in the first place. The aim of the new legislation is to prevent this sort of unwarranted but apparently legal enrichment.

(See also M. Tancelin, Des obligations: contrat et responsabilité (4th ed. 1988), at p. 494, paras. 835-36.)

As we have seen, the purpose of these remedial provisions was to permit the discharge of a debtor upon the sale at law of an immoveable property, based not on the price obtained at auction, as before, but on the actual value of the property, independent of its sale price. Faribault, supra, explains how these provisions operate at pp. 639-40:

[translation] Today, the adjudication price of the immoveable is not used to discharge all or part of the debt; rather, the real value of the immoveable at the time of the adjudication must be applied to reduce the debt.

The legislature has also provided for the case in which the creditor-purchaser realizes a profit by reselling or exchanging the immoveable, and in order to remedy this situation has decreed that if, in that transaction, the creditor receives an amount which is sufficient to discharge the debt, including principal, interest and costs, the debtor is discharged as if it had paid with its own funds.

The Quebec Court of Appeal adopted this approach in Placements Racine Inc. v. Trust général du Canada, [1989] R.J.Q. 2287, at p. 2291:

[translation] In enacting these provisions, the legislature wished to provide that the hypothecary creditor could not, because of the operation of the rate of interest, find itself with the immoveable in addition to a sum of money which might amount to much more than the initial amount of the claim, and the opportunity of claiming payment of a residue in addition.

Accordingly, and solely for the purposes of this kind of situation, the legislature has established specific rules, and by operation of the law itself has created a sort of fiction. When the debtor applies for discharge, being of the opinion that the immoveable thus acquired is worth as much as or more than the total amount of the claim, a mechanism for evaluating the claim and the immoveable is set in motion, which mechanism has its own peculiarities and applies to no other case.

The value of a particular immoveable is defined in art. 1202a, para. c. C.C.L.C. as "its fair yielding, investment or commercial value in times of normal economic activity, regardless of its depreciation for the time being through a regional or general economic depression". Alternatively, if a creditor has resold or disposed of the property for an amount greater than its purchase price at auction, the value of the immoveable will be that price, minus expenses for maintenance and improvement of the property (art. 1202b, paras. b. and c.).

Since the provisions of arts. 1202a et seq. C.C.L.C. constitute remedial legislation, courts have generally adopted a large and liberal interpretation of them. In the words of Chouinard J.A. in Placements Racine, supra, at p. 2289:

[translation] The legislature has created a corrective mechanism which it seems to me must be interpreted in such a manner as to give full effect to it, and not in a restrictive manner.

It is against this background that this case must be decided.

It is clear that the remedial dispositions in question were applicable to Garcia. To guarantee the money it owed, it had hypothecated its immoveable property, which the Bank seized and sold at a sheriff's sale in execution of a judgment in its favour. The Bank has since acknowledged that the product of the sale of all three immoveables did totally discharge Garcia's debt towards it and accordingly released Garcia following the second sheriff's sale. Nonetheless, Garcia now seeks a declaration by the Court that it was entitled to a full discharge after the first sheriff's sale, with the consequence that the second sheriff's sale should be vacated and Garcia's developed lot returned to it.

In its inscription in appeal, Garcia asked the Court of Appeal for a declaration that the property sold at the first sheriff's sale on September 12, 1984 had a value equal or superior to Garcia's debt to the Bank, for its discharge on the basis of that first sale, and for the Court to:

[translation] VACATE for all legal purposes the sale at law which took place on December 7, 1984 and the sheriff's sale (décret) relating to the said sale at law in the case cited above;

ORDER that the mis en cause Registrar make such entries or inscriptions as may be required for the purposes hereof;

RESERVE all of your applicant's rights and remedies both against the respondent, in its capacity as trustee, and against the mis en cause Federal Development Bank . . . .

In Garcia's factum before that same court, however, it sought slightly different conclusions with respect to the second sheriff's sale. In addition to asking that it be discharged on the basis of the first sheriff's sale, or, in the alternative, upon payment of the difference between the value of the property sold at that sale and the amount of Garcia's debt to the Bank, Garcia requested the court to:

[translation] Reserve to the appellant all its rights and remedies against the respondents arising out of the second judicial sale on December 7, 1984, when it was declared to be the vendor of the immoveable described as follows:

[description of property sold at second sale]

which sale was effected when the appellant had been discharged and for all legal purposes owed nothing to the respondents.

Three questions arise which bear on Garcia's right. First, was the value of the property sold at the first sheriff's sale sufficient to satisfy the judgment in its totality? The trial judge rejected Garcia's request for discharge, because, according to his calculations, the value of the property sold at the first sheriff's sale was insufficient to satisfy the debt owing to the Bank. The Court of Appeal reversed, finding that the trial judge had erred in his valuation by deducting an amount of $50,000 from the value of the land (at pp. 927-28):

[translation] Garcia argues that the $50,000 duplicates the price of $0.20 per square foot for the swamp and wetlands, and that, accordingly, it should not have been deducted from the total value.

This is correct. The unit costs take into account the disadvantages of the lot and reflect, in relation to the prices of the land which may immediately be developed, what it will cost to bring this land to the same level of development as the rest. Moreover, the trial judge found the fact that fill would be required on some parts of the land to be a limitation. The evidence is to the contrary. Contractors pay to dump fill at this location.

Accordingly, the $50,000 should not be deducted. The value of the land which was the subject of the first sale was therefore sufficient to discharge Garcia.

Since the Bank has not appealed this finding by the Court of Appeal, and the issue was neither raised nor discussed before us, we must assume that Garcia had a right to claim its release after the first sheriff's sale.

However, and this is the second question, could Garcia seek its release in face of its waiver not only renouncing such right, but also acknowledging in advance that the value of the property to be sold would be the price of adjudication? While the trial judge did not discuss this issue, given his negative answer to the first question, the majority of the Court of Appeal came to the conclusion that such waiver was null and void in the circumstances and, accordingly, that Garcia was free to pursue its claim.

Leaving aside for the moment the third question, i.e., the issue of res judicata to which I will return later, the question here is whether arts. 1202a et seq. C.C.L.C. are provisions of public order and, if so, whether they can be waived.

Public Order

Legislators have increasingly recognized that complete contractual freedom, premised on the notion of equality of parties, may be a cause of injustice to some. Moreover, adhesion contracts, the terms of which are not usually open to negotiation, have proliferated. Jacques Ghestin summarized the situation in his comparative study of Quebec and French law, Le contrat dans le nouveau droit québécois et en droit français (1982), at p. 7:

[translation] Of course, there are still contracts of the classical type, contracts similar to those which existed in 1804. However, most contracts today are of a new type which we might describe by pointing out, first, the actual aspects of inequality between the contracting parties, and second, the standardization of contracts.

Unequal bargaining power means that some parties are in no position to negotiate more favourable conditions and they are at times forced to accept unfavourable contractual conditions dictated by their more powerful counterparts, conditions which expose them to unduly harsh penalties in case of default. In the words of Professor P.-A. Crépeau in his article, "Contrat d'adhésion et contrat type", in Mélanges Louis Baudouin (1974), 67, at p. 71:

[translation] While the phenomenon of the standardization of contractual relations which is a characteristic of the consumer society may, according to some observers, offer a number of advantages, not only for the producer or contractor, but also for the consumer, it is nonetheless open to, and in fact has often provided the opportunity for abuse on the part of the stronger party, who exploits its position of economic or social superiority in order to impose a draconian scheme, and sometimes a state of veritable bondage, on the weaker party.

This erosion of particularised contracts and equality of bargaining parties, and the effects resulting from these phenomena, have attracted attention both in Quebec and in France. Besides Ghestin and Crépeau, see P. Azard, "Le contrat d'adhésion" (1960), 20 R. du B. 337; G. Trudel, "Des frontières de la liberté contractuelle", and A. Popovici, "Les contrats d'adhésion: un problème

dépassé?", both in Mélanges Louis Baudouin, supra, 217 and 161 respectively, and, more recently, R. Jukier's comment entitled "Banque Nationale du Canada v. Houle (S.C.C.): Implications of an Expanded Doctrine of Abuse of Rights in Civilian Contract Law" (1992), 37 McGill L.J. 221, at pp. 240-41, as well as another scholarly work, M. Coipel, "La liberté contractuelle et la conciliation optimale du juste et de l'utile" (1990), 24 R.J.T. 485. Some of the cases which have referred to the phenomenon include Ocean Accident & Guarantee Corp. v. Air Canada, [1975] R.P. 193 (C.A.), and Venne v. Quebec (Commission de protection du territoire agricole), [1989] 1 S.C.R. 880. In France, this pattern was commented upon by L. Josserand, "Aperçu général des tendances actuelles de la théorie des contrats" (1937), 36 Rev. trim. dr. civ. 1, at pp. 3-5, 8-12; G. Farjat, L'ordre public économique (1963), at p. 118; G. Couturier, "L'ordre public de protection, heurs et malheurs d'une vieille notion neuve", in Études offertes à Jacques Flour (1979), 95, and by M. Gégout, "Ordre public et bonnes m{oe}urs", in Juris-classeur civil, Art. 6, fasc. 1, at pp. 3-4.

In response to these developments, legislators have enacted laws which seek to restore the level playing-field for contracting parties and specifically to protect weaker contractants. Unlike most of the original provisions of the Civil Code of Lower Canada, which serve merely to supplement contractual terms and which may be waived by contracting parties, such remedial legislation is imperative, so that it applies to all contracts, even those inconsistent with it. Pierre Ciotola writes in "Aperçu des conditions illicites et immorales" (1970), 72 R. du N. 315, 407, at pp. 418-19:

[translation] Recent legislation reveals the legislature's concern with ensuring that the rights of the debtor are protected. A debtor in difficult but transitory circumstances will not be completely unprotected in the face of a creditor's greed. . . . Faced with exorbitant contractual terms which have really become standard form in contracts of warranty, the legislature has intervened either by prohibiting such exorbitant terms or by regulating how they may be exercised, out of a desire to protect the debtor. The rule of contractual freedom gives way to the need for social and economic measures. [Emphasis added.]

Doctrine in both France and Quebec has recently classified this type of law as one of economic protective public order. In France, Jean Carbonnier, Droit civil, vol. 4, Les obligations (15th ed. 1991), No. 70, at p. 141, first distinguished between political and economic public order, the former being the classical notion of public order, the latter being of more recent vintage, and further divisible into protective and directive economic public order; see also J. Ghestin, Traité de droit civil, vol. 2, Les obligations -- Le contrat: formation (2nd ed. 1988), at pp. 106-8, 114-16. In Quebec, the distinction between political and economic public order has been adopted by Professors Jean-Louis Baudouin, Les obligations (3rd ed. 1989), Nos. 83-88, at pp. 80 et seq., and Jean Pineau and Danielle Burman, Théorie des obligations (2nd ed. 1988), No. 120, at pp. 172-75.

Pierre-André Côté, for his part, in The Interpretation of Legislation in Canada (2nd ed. 1991), distinguishes between classical laws of public order and this more modern breed of legislation (at p. 208):

There are different categories of public order statutes or provisions. It is not surprising that those enacted exclusively in the public interest cannot be waived by an individual, because such laws were not passed in his interest.

But other statutes, at least at first glance, appear to have been enacted exclusively in the interest of certain members of society. This is the case with "protective" statutes, because they benefit members of society considered particularly vulnerable, for one reason or another. Although apparently enacted only in the interest of those whom they protect, such laws have often been considered of public interest, and as a result not subject to waiver.

While the best example of this type of law involves consumer protection, the category also includes legislation establishing licensing requirements and professional qualifications, labour laws and labour standards acts, and landlord-tenant legislation.

This Court has long since recognized that laws enacted for the protection of a particular group may be of public order, even in the absence of a specific reference by the legislator. For example, in Pauzé v. Gauvin, [1954] S.C.R. 15, this Court determined that the Architects Act, R.S.Q. 1941, c. 272, was such legislation because, although it was enacted primarily for the benefit of architects, it also served to protect the public at large from incompetent or dishonest builders. In the words of Taschereau J. at p. 19:

[translation] Clearly, the intention quite correctly was that truly skilled professionals be made available to the public, which rightly demands that buildings be properly constructed.

Likewise, the Quebec Court of Appeal has consistently held that laws establishing professional standards are of public order, even though, in one aspect, they protect a limited group within society; see Landry v. Cunial, [1977] C.A. 501; Pouliot v. Cie Trust Royal, [1980] C.A. 157; Belgo-Fisher (Canada) Inc. v. Lindsay, [1988] R.J.Q. 1223; Stern v. G.S.A. Management Inc., C.A. Montreal, No. 500-09-000485-813, December 19, 1983; In re Réserves du Nord (1973) Ltée: Biega v. Druker, [1982] C.A. 181.

The criterion which distinguishes laws of public order from other types of laws is to be found in the public, as opposed to merely private, interest with which the legislator is concerned, as was recognized in Mongrain v. Auger, [1967] Que. Q.B. 332; Brousseau v. Hamel, [1968] Que. Q.B. 129, and Martel v. Martel, [1967] Que. Q.B. 805. This distinction was retained in the Report on the Québec Civil Code: Draft Civil Code (1978), vol. I, Book Five, arts. 48 and 49, as well as in the Civil Code of Québec, S.Q. 1991, c. 64 (not yet in force), arts. 1417 to 1421, in particular arts. 1417 and 1419, which read:

1417. A contract is absolutely null where the condition of formation sanctioned by its nullity is necessary for the protection of the general interest.

1419. A contract is relatively null where the condition of formation sanctioned by its nullity is necessary for the protection of an individual interest, such as where the consent of the parties or of one of them is vitiated.

Identifying laws of economic protective public order, however, is not always easy, since the absence of an explicit statement by the legislator is not determinative. Courts need not even rely upon a particular legislative provision to find a contravention of public order, as Baudouin, supra, remarks at p. 81:

[translation] Most of the time, the legislature intervenes directly to establish what is a matter of public order. Sometimes there is even an explicit statement in the statutory or regulatory provision that it is of public order; sometimes it indicates that there can be no contractual derogation from the rule, and that any such derogation will be null. Sometimes, on the contrary, the legislature clearly indicates that it is left to the parties themselves to settle the question and that the rule that is set out will apply only to supplement their agreement. . . . In other cases, finally, the formula used does not directly suggest that the statute is truly imperative. It is then for the courts to determine the legislative intention and to decide whether the provisions should be treated as being of public order, that is, to determine whether they are imperative provisions or merely supplement the will of the parties. [Emphasis added; italics in original.]

Similarly, these comments by Gégout, supra, have as much application in Quebec as in France (at p. 4):

[translation] However, if the statute is silent as to whether it is of public order, that does not mean that it does not involve public order. It may do so, regardless of the words used, by virtue of its importance in the organization of society or in a branch of legal activity. There are not only laws of public order, but, as article 6 states, laws "which concern" public order and which create a sort of virtual public order. It is then for the judge, based on the statutory provision, to set the limits of this public order. [Emphasis added.]

See also A. Perrault, "Ordre public et bonnes moeurs" (1949), 9 R. du B. 1, at p. 4, and Pineau and Burman, supra, at p. 175.

In the case at bar, arts. 1202a et seq. C.C.L.C. are framed in facultative language, and it could be argued that they protect only a very limited group in very particular circumstances. In my opinion, however, the Court of Appeal was correct in concluding that these provisions were enacted in the public interest, and are hence imperative.

First, it can be inferred that, in enacting this law, the legislator intended not only to protect a limited group, but to promote the economic health of society in general. The nefarious practices of certain creditors, which arts. 1202a et seq. C.C.L.C. were meant to check, harmed not only their unfortunate debtors, but also by implication the larger economic order in Quebec. To reiterate Faribault's comments, supra, at p. 639:

[translation] By adding this section to the code in 1947, by II Geo. VI, c. 71, the legislature wished to put an end to an abuse which, as it spread, was threatening to become a genuine disaster. [Emphasis added.]

Or, as Tancelin, supra, noted at p. 494, para. 835:

[translation] This legislation [arts. 1202a et seq. C.C.L.C.] is part of a line of remedial measures necessitated by the absence of a reasonable limit on contractual freedom, particularly in article 1012 C.C., which makes it possible to stipulate unconscionable and usurious clauses in financing contracts, such as a giving in payment clause.

Moreover, the provisions of arts. 1202a et seq. C.C.L.C. are consistent with other laws of public order which have been enacted in recent years for the protection of debtors. For example, arts. 1040a et seq. C.C.L.C. provide that creditors may not, without notice, seize immoveable property used to secure a debt, and that courts may intervene to reduce the amount of a debt if it is excessive and its operation is "harsh and unconscionable". Although, as Vallerand J.A. pointed out, art. 1040e C.C.L.C. specifically states that these provisions are of public order, the legislator's silence in this respect in arts. 1202a et seq. C.C.L.C. is not an obstacle to a judicial finding that the provisions were enacted for public order.

More importantly, though, if the provisions of arts. 1202a et seq. C.C.L.C. are to have any effect, they must be imperative. The reality of the relationship between creditor and debtor is such that the terms of a loan are often standard and are dictated by the lender, becoming real adhesion contracts. As Jacques J.A. pointed out, if these provisions were merely facultative, a waiver of their benefit would quickly become a standard clause in every contract of loan in Quebec (at p. 928):

[translation] Articles 1202a et seq. of the Civil Code, entitled "Of the Discharge of Certain Debtors", were enacted solely for the protection of debtors.

On its very face, section VIII (arts. 1202a to 1202l) of the Code does not deal with the interpretation of contracts, nor does it simply supplement the intention of the contracting parties. It is imperative in that it creates rules for the discharge of a debtor. It would be pointless, if these rules were optional. It would not achieve its goal if that were the case. It defeats the intention of the contracting parties, even though this fact is not spelled out, but results from the text and from the nature of the right which it creates.

Section VIII therefore comprises a set of legislative provisions which are of economic and protective public order for the benefit of hypothecary debtors. [Emphasis added.]

I agree. The case at bar provides a good example of the very evil which the legislator sought to avoid and the necessity that the provisions be imperative. The Bank conceded that Garcia was released from the debt owed to it as a result of the second sheriff's sale. Had it not, and were arts. 1202a et seq. C.C.L.C. not of public order, the Bank would be under no obligation to discharge Garcia even now. It could continue to execute its judgment against Garcia for the remainder of the debt, even though the immoveables which it owns are worth more than the amount of its judgment, including interest. This, of course, would render the provisions totally ineffective, contrary to the spirit of the legislation and to the clear intent of the legislator.

For these reasons, I am of the view that the Court of Appeal was correct in concluding that arts. 1202a et seq. C.C.L.C. constitute a law of economic protective public order. What consequences does this entail?

The Waiver

The first and most important consequence is that, in principle, one cannot waive the benefit of such public order legislation. Article 13 C.C.L.C. is quite explicit in this respect:

> 13. No one can by private agreement, validly contravene the laws of public order and good morals.

Whereas this is the fundamental consequence, legal writers and, more recently, courts have held that agreements which contravene protective laws give rise only to relative nullity. Baudouin, supra, writes (at p. 85):

[translation] In classical doctrine and jurisprudence, the sanction which is imposed for violation of the public order in a juridical act is absolute nullity. However, the law in this area has changed. When the rule deals with protective public order, it is logical, precisely in order to ensure that the goal sought is attained, that only the party whom the rule is designed to protect may invoke such nullity. [Emphasis added.]

Ghestin, Le contrat dans le nouveau droit québécois et en droit français, supra, explains (at pp. 41-42):

[translation] It is clear that if the rule is designed to protect only one of the two parties, that party alone will be authorized to bring action in nullity. This is inherent in the rules of protective public order.

Other French authors who share this view include G. Ripert, "L'ordre public et la liberté contractuelle", in Mélanges François Gény (1936), at p. 352; Couturier, supra, at p. 101; and Gégout, supra, fasc. 2, at p. 6. Quebec courts have applied this exception in Belgo-Fisher (Canada) Inc. v. Lindsay, supra; Girard v. Groupe Desjardins assurances générales, [1989] R.R.A. 153 (C.A.); Pomerleau v. 2319-8419 Québec Inc., [1989] R.J.Q. 137 (Sup. Ct.); Gélinas v. Caisse populaire de St-Sévère, [1990] R.R.A. 566 (Sup. Ct.); Letellier v. Century 21 Citadelle Ltée, [1990] R.D.I. 42 (Sup. Ct.).

The party whom the legislation seeks to protect may thus waive or renounce its benefit, and I agree with Vallerand J.A. when he writes at p. 931:

[translation] These provisions are indisputably an impediment to contractual freedom. The scope of application must therefore not be extended beyond what is necessary to accomplish the purposes of the legislation, to ensure that the weaker party is protected precisely when it is in a position of weakness. To go any further would be to risk preventing the debtor from deriving a benefit from a derogation which might at that specific moment appear to be to its advantage.

The question here is not so much whether such dispositions can be waived but rather the moment at which such waiver is permissible in order to achieve the purpose of the law. According to Vallerand J.A., a waiver may be invalid when given at the time of signing the original deed of loan, but valid where contained in a subsequent agreement which benefits one or both parties and was freely negotiated by them. The majority favoured a more restrictive approach.

The general rule is that a valid waiver can only be given after the party, in whose favour the law has been enacted, has acquired the right created under the legislation. It is then, and only then, that the weaker party, such as the debtor in this case, can make an enlightened choice between the protection afforded by the law, and some advantage that it may derive from the other party in exchange for its waiver of that protection, as Gégout, supra, observes at fasc. 2, at p. 10:

[translation] . . . the increasingly frequent appearance of protective rules in economic public order has brought about a great increase in the number of cases in which the parties may waive a rule of public order which is enacted solely in their interest. However, there must be agreement as to the scope of this assertion: protective public order operates to ensure that the weaker contracting party has full freedom against the stronger party; it would completely miss its mark if the protected person could waive it at the time the contract is made. . . . The person affected must, with full knowledge, at the time when the protection is to take effect, no longer be at risk of being subject to pressure from its adversary.

This is why the waiver of a legal protection of public order can be contemplated only in respect of acquired rights. The law does not impose rights on individuals, but makes it possible for them to acquire rights; it does not prohibit waiver of a right which is not yet choate; the only condition for a waiver of such rights to be valid is that the conditions in which they may be acquired have been fulfilled. [Emphasis added.]

Couturier, supra, also emphasizes the continuing need for protection of the party in the inferior bargaining position, right up to the time that the right is acquired (at p. 106):

[translation] However, the rules which come under protective public order are not merely imperative: they are designed to protect a contracting party who is placed in an inferior position; because the aim is to protect that party against foreseeable weaknesses in its own agreement, it could not be permitted to renounce the legal protection: to do so would be to destroy that very protection. So long as the inferior position which explains and justifies the intervention of the legislature persists, any waiver of the benefit of the law, even when it bears on acquired rights, would appear to infringe the requirements of protective public order. [Emphasis added.]

Or, as Ghestin, Le contrat dans le nouveau droit québécois et en droit français, supra, at p. 42, remarks:

[translation] Finally, it is logical, in a situation involving protective public order, to authorize the person who was protected to waive such protection, but on condition that it be done when the protection is no longer necessary. [Emphasis added.]

To conclude on this point, one may waive a provision of economic protective public order since its breach results in relative nullity only. Due to the very nature of the protection afforded, however, such waiver is only valid when given after the right has been acquired and not before. In my view, Jacques J.A. correctly stated the law when he wrote at p. 929:

[translation] It is now accepted that the party who benefits from the protection of a law of economic and protective public order may waive it. However, such waiver may not be given in advance. It may be given only when the right which the legislation grants is choate and may be exercised with full knowledge, just as, by analogy, an act of ratification of a voidable obligation must express, inter alia, the intention to cover the cause of the nullity (Art. 1214 C.C.) [Emphasis added.]

In the case at bar, while Garcia waived the protection of 1202a et seq. C.C.L.C. after it had defaulted and judgment on the balance of its debt had been rendered against it, it had not yet at that time acquired the right to ask for its discharge. The provisions here in question are not destined purely and simply to protect a debtor but rather are specifically designed to protect a debtor whose immoveable property is sold at a sheriff's sale (notorious for their low sales prices) in execution of a judgment. The right to ask for a discharge arises only after a sheriff's sale has taken place. The debtor then has grounds to seek its release based on the value of the property sold. If the rationale for the protection of debtors in such circumstances is their position of weakness, surely it applies not only at the time of signing the loan, but a fortiori at the time of sale. Garcia's waiver, signed before any sale had taken place, was hence premature, and, given that the discharge provisions were of public order, is null.

Besides, while it may be true that Garcia obtained a concession from the Bank in return for its waiver, namely the splitting of the sheriff's sale into two, it certainly was not to its advantage to agree that the adjudication price at the first sheriff's sale was to be considered the real value of the property sold, nor to agree to waive its right to claim its discharge after that sale. While the Bank was free to make this concession, and indeed the splitting of the sale was at all times a valid subject for negotiation between the parties, the waiver obtained in return was by no means essential to the agreement. The Bank could simply have accepted or refused Garcia's request to split the sale.

I realize, however, that had Garcia not signed the waiver, the Bank may very well not have acceded to its request and Garcia could not then have benefitted from the possibility that the adjudication price of its undeveloped property (sold at the first sale) would satisfy the Bank's judgment. In certain cases, such as this one, a law of public order may be a two-edged sword, because the invalidity of a waiver of its provisions by the party it was intended to benefit may deprive that party of the opportunity to bargain as fully as it might wish, in order to minimize its loss. It is up to the legislator, of course, to adopt legislation which best serves its public policy goals.

In fact, the proposed Civil Code of Québec, S.Q. 1991, c. 64 (adopted and sanctioned December 18, 1991, to come into force, according to the Final Provisions, "on the date to be fixed by the Government, in accordance with the provisions of the legislation respecting the implementation of the Civil Code reform") contains Section VI, entitled "Discharge of the Debtor", which is considerably shorter and differently worded than the current provisions and which, in particular, provides for the automatic discharge of a debtor in Garcia's situation. It reads:

1695. Where a prior or hypothecary creditor acquires the property on which he has a claim, as a result of a judicial sale, a sale by the creditor or a sale by judicial authority, the debtor is released from his debt to the creditor up to the market value of the property at the time of the acquisition, less any claims ranking ahead of the acquirer's claim. [Emphasis added.]

The debtor is also released where, within three years from the sale, the creditor who acquired the property receives, by resale of all or part of the property or by any other transaction in respect of it, value equal to or greater than the amount of his claim, including capital, interest and costs, the amount of the disbursements he has made on the property, with interest, and the amount of the other prior or hypothecary claims ranking ahead of his own.

1696. The creditor is presumed to have acquired the property if it is sold to a person related to or in collusion with him, especially a relative by blood or a person connected by marriage up to the second degree, a person living with him, a partner, or a legal person of which he is a director or which he controls.

1697. A debtor, on being released, is entitled to an acquittance from his creditor.

If the creditor refuses to grant the acquittance, the debtor may move that the court declare his release. The judgment attesting the release is equivalent to an acquittance with respect to the creditor.

1698. Release of the principal debtor entails release of his sureties and other warrantors, who may exercise the same rights as the principal debtor, even independently of him.

Gone also is the present art. 1202k C.C.L.C., which prevents a debtor from compelling its creditor from remitting any amounts legally collected before the release. Had these provisions been in force when the first sale took place in this case, many of Garcia's procedural hurdles may have been overcome. However, there is nothing in this new section which relates to split sales where more than one immoveable property secures a debt, a matter at the heart of the present case and one which is in the domain of the legislator, not the courts.

Having reached the conclusion that Garcia's premature waiver of its rights under arts. 1202a et seq. C.C.L.C. is null and that the value of the immoveable property sold at the first sheriff's sale was sufficient to satisfy its debt to the Bank, the next question is whether it can obtain the remedies it now seeks, i.e., its discharge retroactive to the time after the first sheriff's sale, and the vacating of the second sheriff's sale. These, of course, are two different remedies and, even though they are interrelated in this case because the sheriff's sale was split, they are governed by different rules. Accordingly, the procedural requirements for each of the remedies will be

analyzed in turn.

Procedural Requirements

1. Vacating of the Second Sheriff's Sale

It must be recalled that the Bank countered the conclusion of Garcia's action as regards the vacating of the second sheriff's sale with a preliminary motion to strike which was granted by the trial judge in these terms:

[translation] WHEREAS although paragraphs 6 to 12, inclusive, of the applicant's motion and sections 13 and 14 of the same applicant [sic], which read as follows, are deemed to be true for the purposes hereof, they do not indicate fraud or failure to observe the formalities which are necessary for sale . . .;

WHEREAS these allegations are insufficient to justify the grounds set out in articles 698 and 699 of the Code of Civil Procedure;

. . .

ACCORDINGLY THE COURT grants the motion to strike (non-suit) by the respondent ROYAL TRUST COMPANY and the mis en cause FEDERAL DEVELOPMENT BANK in part;

DISMISSES the following two conclusions in the motion to discharge a debtor dated February 22, 1985, submitted by GARCIA TRANSPORT LTÉE, which read as follows:

1. VACATE for all legal purposes the sale at law which took place on December 7, 1984 and the sheriff's sale (décret) relating to the said sale at law in the case cited above;

2.ORDER the mis en cause Sheriff to stay any other proceedings relating to the sale which took place on December 7, 1984 . . . .

Although Garcia did not appeal this ruling, it seems that it pursued its original claim in the Court of Appeal.

Assuming without deciding for the moment that this judgment did not constitute res judicata on this aspect of the claim -- a matter to which I will return later -- and that the judgment on this point could still be appealed together with the final judgment, I am of the view that the trial judge was right to grant the motion of non-suit and to strike these conclusions for the reasons he expressed.

At the outset, one must recognize that the provisions of arts. 1202a et seq. C.C.L.C. do not explicitly deal with split sheriff's sales. It seems rather that the legislation assumes that there will be only one sale of the hypothecated property, whether it consists of one or more immoveables. In fact, this is what normally happens. This does not mean, of course, that split sales are forbidden or that, if there is a split sale, the debtor loses its right to a release should the value of the property sold at the first sale be sufficient to cover its debt. The right to a discharge, however, must be claimed according to the procedure established for that purpose. The vacating of a

second sheriff's sale is not one of these procedures and for good reason.

Titles granted by sheriff's sales in Quebec's civil law are treated with a considerable degree of respect and courts do not tamper with them lightly. Strict rules govern them and stringent conditions must be met in order to vacate them (arts. 698, 699 and 700 C.C.P.). In this respect, it has been remarked that Quebec law is much stricter than French law: Bérard v. Barrette (1874), 5 R.L. 703 (Sup. Ct.), and Lymburner v. Courtois (1922), 34 Que. K.B. 341.

First, the purchase of an immoveable property at a sale at law is treated as a true sale, despite the lack of consent on the part of the owner of the property, as Marler states in his well-known treatise The Law of Real Property (1932), at p. 309, par. 658:

The effect of the adjudication: -- The adjudication, says Pothier, [translation] "contains a genuine sale of the property seized to the purchaser by the justice system, for and despite the party from whom it was seized".

It vests the ownership of the immovable sold, subject to the rights set forth in the advertisements, and those not purged by the sale, in the purchaser, subject to his paying the price. When the price has been paid, the purchaser becomes owner from the date of the adjudication. . . . [Emphasis added.]

Moreover, Quebec courts have long and consistently held that an attack upon a sheriff's sale is an attack upon a title conferred not just by an individual, but by the justice system as a whole. One of the first cases to emphasize this point was Patton v. Morin (1865), 16 L.C.R. 267 (Q.B.), in which Mondelet J.A. wrote at p. 272:

[translation] Whereas the plaintiff should have opposed the seizure and sale of the said immoveable, but, on the contrary, allowed the said immoveable to be sold and adjudged at law without expressing his complaint and opposing the said seizure and sale;

Whereas at the time of the seizure and sale of the said immoveable by the said sheriff, the said Simon Octeau was considered to be the owner, and that as such the seizure executed against him was valid, and the adjudication effected under such circumstances must even defeat the rights of the owner, if he did not oppose it;

Whereas judicial sale, accompanied by the legal formalities, must be respected, and cannot be placed in doubt without adversely affecting the effectiveness of title granted under the hand of the judicial system. . . . [Emphasis added.]

This theme was again taken up in Perrault v. Mousseau (1896), 6 Que. Q.B. 474, where Hall J.A. wrote at p. 480:

It is obvious that a petition en nullité de décret must be scrutinized with care. It attacks one of the most important acts of procedure of any court of record, -- the enforcement of its own judgment, and puts in issue not only the regularity of that procedure, but jeopardizes the rights, as in this case, of innocent third parties, who purchase property put up for public, judicial sale under all the solemnities and formalities of the law. [Emphasis added; italics in original.]

Montgomery J.A. simply wrote in Dyer v. Bradbury-Parry, [1976] C.A. 106, that: "A sheriff's sale is generally final and binding" (p. 107).

Given their role in the execution of judgments and the rights conferred by them, as well as the necessity of guaranteeing the stability and certainty of titles, sheriff's sales cannot be easily attacked. Taschereau J. noted in Boileau v. Procureur général du Québec, [1957] S.C.R. 463, at p. 470:

[translation] Obviously, title which is granted by the sheriff should be disturbed only with the utmost caution.

More recently, in Town of Anjou v. C.A.C. Realty Ltd., [1978] 1 S.C.R. 819, aff'g [1974] C.A. 197, aff'g [1972] C.S. 808, this Court dismissed an appeal against a judgment by Turgeon J.A., who wrote at p. 199:

[translation] A sheriff's sale is a procedure which confers more absolute rights on the purchaser than a voluntary sale. It is preceded by strict formalities aimed at protecting the judgment debtor and the purchaser. It should be remembered that under art. 577 C.C.P. the adjudication of property under execution transfers the ownership thereof to the purchaser from its date, and that this principle is in the public interest. [Emphasis added.]

Pigeon J., writing for the majority, noted first that the importance of the validity of sheriff's sales is underlined by legislation enacted in Quebec to limit the means by which they could be attacked. In dismissing the motion to vacate the sale, he concluded (at p. 828):

It is obviously highly regrettable for appellant to lose the amount of the taxes that were owing to it at the time of the sale, and in the case at bar it would certainly be fairer for the purchaser of the immovable not to be relieved of them by the failure of the municipal authorities to follow the appropriate procedure within the time prescribed. If it were possible to arrive at this result without impairing the principle of the inviolability of judicial sales, I would be in favour of doing so. [Emphasis added.]

For other recent cases where this Court has applied this restrictive approach to motions to set aside sheriff's sales, see St-Gelais v. Banque de Montréal, [1968] S.C.R. 183, aff'g [1966] Que. Q.B. 365; and Gobeil v. Cie H. Fortier, [1982] 1 S.C.R. 988.

A rationale sometimes invoked in support of this restrictive approach is that a sheriff's sale confers more rights upon a buyer than an ordinary sale, because it discharges the immoveable from all real rights save those mentioned specifically in arts. 695 and 696 C.C.P. In Canada Investment and Agency Co. v. McGregor (1892), 1 Que. Q.B. 197, aff'd (1892), 21 S.C.R. 499, Bossé J.A., speaking for the Court of Appeal, concluded at p. 205:

[translation] Whereas this sale was preceded and accompanied by all the formalities required for judicial sales, that it was moreover made upon Craig who was then in public and peaceful possession thereof as apparent proprietor of the said lot in virtue of duly registered authentic deeds which were regular on their face;

Whereas the plaintiff, who had attained his majority at the time of the sale, did not oppose the sale;

Whereas the judicial sale which was effected in the circumstances formed a perfect title, and we should not go behind it and inquire into the grounds of nullity invoked by the plaintiff against the sale of the same lot by his tutrix on October 15, 1866, nor rule on the other defences submitted. . . . [Emphasis added.]

In upholding this decision, Fournier J. added in this Court at p. 512:

[translation] According to the Act and to the decisions in the province of Quebec, a judicial sale accompanied by the legal formalities gives complete and absolute title to property sold to the purchaser and discharges the property of any rights which might burden the property, with the exception of the hypothec resulting from the commutation of seigniorial rents, from emphyteusis, from substitutions which have not opened and from common law dower which has not become choate. By art. 711 C.C.P. the sheriff's sale discharges all other rights.

As was stated above, McGregor's will contained no substitution, and so the judicial sale had full and complete effect and discharged the rights of the proprietor since he failed to oppose the sale at the proper time. [Emphasis added.]

Finally, given the strict formalities which must be followed prior to a sale at law, and the relative ease with which interested parties, most notably the owner of the property, may oppose the seizure and sale before the latter takes place, a petition to vacate the sale will be scrutinized strictly and granted only exceptionally. Petitioners who could have opposed the seizure and sale, but who failed to do so, generally do not succeed in having a sheriff's sale set aside because their failure to act earlier implies that they consented to whatever irregularity they might later invoke, according to Taschereau J.'s reasons in this Court's judgment in Canada Investment, supra, at pp. 515-16:

[T]he plaintiff, being of age at the time of the sheriff's sale to the defendant, though I do not see what difference that makes, was bound then to oppose the sale and assert his right, if he had any; . . . his default to do so precludes him from now attacking the validity of the defendant's title, as this sale has been accompanied with all the formalities required by law, and as Craig upon whom it has been made was then in possession as proprietor of the said lot in virtue of duly registered authentic deeds. . . .

. . . Assuming that he had rights to this property the appellant has lost them by the sheriff's sale. Vigilantibus non dormientibus subvenit lex. [Emphasis added.]

The requirement that the party who opposes a sale must do so before the sale takes place is very well established in Quebec, as illustrated by these comments in Genier v. Kerr (1893), 3 C.S. 409 (at p. 411):

[translation] . . . the informality of which [the plaintiff] complains appeared on the face of the minutes of the seizure and the advertisements, of which he received copies. Why did the plaintiff not oppose the sale at the proper time? His silence was acquiescence. This was only a relative nullity which he could cover with his consent, and this is what he did. [Emphasis added.]

Similarly, in Veilleux v. B. Trudel et Cie (1933), 55 Que. K.B. 481, Tellier C.J.Q. wrote at pp. 484-85:

[translation] Undoubtedly, the plaintiff would have been entitled to prevent the sale, by filing an opposition for that purpose, in order to have the matter heard. . . . Here, however, the plaintiff did nothing to oppose the sale. The pasteurizer was therefore sold as an immoveable; in the eyes of the sheriff, as of any stranger to the lease-to-purchase contract, this was perfectly in order. . . . A third party whom the seizure may affect need only assert its rights, by opposing the seizure. If it does not do so before the sale, its only recourse then is against the proceeds of the sale. The sheriff's sale discharges all of the real rights not included in the conditions of the sale, except those set out in article 781 of the Code of Procedure. [Emphasis added.]

For other judgments confirming that a sheriff's sale will not be vacated at the request of one who failed to oppose the sale before it took place, see Leclerc v. Phillips (1894), 4 Que. Q.B. 288; Roy v. Lavallée, [1960] Que. Q.B. 438, particularly at pp. 442-43; and Office du crédit agricole du Québec v. Gauvin, [1977] C.S. 589, aff'd C.A. Québec, No. 200-09-000306-77, August 12, 1977.

Consequently, while it remains possible, it is only exceptionally that the vacating of sales at law will be permitted and then, only on limited and enumerated grounds. Those exceptions are found in arts. 698 and 699 C.C.P. Article 699 is confined to purchasers, and accordingly is not relevant here. Article 698 allows "any interested person", including the debtor whose property is seized, to seek the vacating a sheriff's sale on the grounds of fraud, or the non-observance of essential conditions and formalities prescribed for the sale. An informality will generally not give rise to the vacating of a sale, however, unless the petitioner can show that he or she was prejudiced by it: Fort Garry Trust Co. v. Roberts Sprinkler Ltd., [1981] C.S. 905.

Moreover, art. 698 C.C.P. may only be invoked within a short period after the sale has taken place. This delay is peremptory, so that a sale may only be challenged within 90 days, or exceptionally within 6 months, if the applicant can show that it was impossible to act earlier. In the words of Nichols J. in Janelle v. Champagne, [1981] C.S. 898, at pp. 903-4:

[translation] The peremptory delay is designed, first, to make the title of the purchaser unassailable. [Emphasis added.]

Durand J. held in Caisse populaire de St-Eustache v. Entreprises Blainville Ltée, [1989] R.D.I. 355, at p. 357:

[translation] On the other hand, any petition to vacate the sheriff's sale, whether by an interested party or by the purchaser itself, must be brought within the delay set out in art. 700 C.C.P.

. . .

This motion was served . . . well after the delay set out in that article and, as we saw above, the applicant acknowledges that it was not impossible for it to act sooner.

Since this delay is peremptory, expiry of the delay covers any nullity which might have tainted the sheriff's sale -- any relative nullity, obviously, since if it were absolute the legislature could not have established a delay for invoking the nullity.

This rule suffers few exceptions. A sale based upon a judgment or a seizure which is null may be vacated: see Dufresne v. Dixon (1889), 16 S.C.R. 596; Vézina v. Lafortune (1917), 56 S.C.R. 246; and Peiffer v. Lafrance, [1987] R.J.Q. 2616 (Sup. Ct.). Similarly, a sale made super non domino, that is, of property which does not belong to the debtor but to a third party, may be vacated. Since a seizure and sale based on an absolute nullity give rise to a sale which is absolutely, rather than relatively, null, the short delay for challenge set out in art. 700 C.C.P. does not apply; see Peiffer, at p. 2617.

In summary, then, once a sheriff's sale has taken place, it is only exceptionally and on very limited grounds that it can be set aside.

Applying these rules to the facts of this case, I come to the conclusion that, still assuming that there was no res judicata, Garcia could not succeed on its claim to vacate the second sheriff's sale since such claim did not fall within the strict provisions of art. 698.

First, there is nothing in the record, or in the pleadings for that matter, to suggest that the judgment condemning Garcia to pay the balance of its debt to the Bank is null. Garcia did not contest the proceedings, nor did it appeal from the judgment. In fact, Garcia never denied that it owed the amount claimed by the Bank after it defaulted on its payments. Quite the contrary, the agreement Garcia concluded with the Bank confirms its debt and seeks only to provide for its payment in a manner which may have seemed advantageous to Garcia at the time. Under these circumstances, there is no ground for attacking the validity of the judgment originally obtained by the Bank.

Second, having obtained the judgment, the Bank proceeded to execute it legally. It seized the property as it was entitled to do. While it may have relied on the waiver signed by Garcia, a waiver found void as contrary to the public order provisions of arts. 1202a et seq. C.C.L.C., the Bank had not been made aware of any claim by Garcia nor did Garcia initiate any proceeding to be released from its debt to the Bank before the second sheriff's sale took place. Consequently, the second sheriff's sale proceeded legally and Garcia did not have any grounds to attack the validity of that sale.

Finally, while Garcia may have been within the 90 days prescribed by art. 700 C.C.P. when it initiated this action in February 1985, it did not allege any of the grounds set out in the Code of Civil Procedure which would support the vacating of the second sheriff's sale. In allowing the Bank's motion for non-suit, the trial judge found that neither fraud nor the non-observance of essential conditions and formalities with respect to the second sale had been made out. Consequently, Garcia was barred from seeking the vacating of the second sale. The Court of Appeal did not rule on this point although, we are told, it was argued before it.

In conclusion, Garcia's request that the second sheriff's sale be vacated must be denied since it is groundless.

This, strictly speaking, dispenses with the need to deal with the question of res judicata. Since it was one of the bases of the dissent in the Court of Appeal, however, I will add the following comments.

The principle of res judicata in Quebec law finds expression in art. 1241 C.C.L.C.:

> 1241. The authority of a final judgment (res judicata) is a presumption juris et de jure; it applies only to that which has been the object of the judgment, and when the demand is founded on the same cause, is between the same parties acting in the same qualities, and is for the same thing as in the action adjudged upon.

For a thorough discussion by this Court of the application of this provision, see Roberge v. Bolduc, [1991] 1 S.C.R. 374, at pp. 401-27.

The question here revolves around the trial judge's granting of the Bank's motion to strike part of Garcia's action relating to the vacating of the second sheriff's sale. Was that a final judgment? If so, does Garcia's failure to appeal it mean that the issue has become res judicata?

L. Ducharme, in Précis de la preuve (3rd ed. 1986), at pp. 109-10, sets out the rule with respect to the theoretical distinction between interim and final judgments:

[translation] Final judgments are judgments which put an end to the dispute, if not irrevocably, at least in such a way that the judge need not return to the point in issue.

In theory, interlocutory judgments do not have the authority of res judicata. Thus an interlocutory decision dismissing a preliminary motion for non-suit or authorizing the issuance of a writ of evocation does not have the authority of res judicata. . . . This means that, in all such cases, the losing party may commence fresh proceedings by remedying the defect which resulted in the dismissal of its initial action. [Emphasis added.]

J.-C. Royer, in La preuve civile (1987), however, specifically addresses the question of motions of non-suit (at p. 284):

[translation] Motion for non-suit - A judgment is final if it dismisses an action on a motion for non-suit. On the other hand, a judgment dismissing an action for technical reasons does not have the authority of res judicata. The plaintiff may commence fresh proceedings after meeting the prescribed formalities.

L. LeBel, in "L'appel des jugements interlocutoires en procédure civile québécoise" (1986), 17 R.G.D. 391, at p. 400, agrees:

[translation] We must also be careful not to describe a judgment which totally disposes of an action on an interlocutory motion by, for example, allowing a motion for non-suit, as interlocutory. Some counsel make the mistake of treating such a judgment like an interlocutory judgment because the court makes its ruling on preliminary motions. They forget that such a judgment is based on the very essence of the law argued in support of the claim. The courts deal with certain motions, particularly motions for non-suit and preliminary objections to jurisdiction ratione materiae, in the same manner. A motion for non-suit, like the earlier inscription in law, causes the right to be extinguished and technically results in a final judgment when the court allows the motion even before evidence is presented. As in the case of peremption of suits or preliminary objections to jurisdiction ratione materiae, when an appeal may be taken to a court of competent jurisdiction, the judgment extinguishes the main proceeding. That proceeding must still exist if the judgment is still to be considered interlocutory. [Emphasis added.]

Courts have also consistently held that judgments on motions which have the effect of striking out allegations or, for that matter, conclusions, with respect to which no further evidence may be adduced during the trial, constitute a special category of final judgments from which appeal lies immediately. In Davis v. Royal Trust Co., [1932] S.C.R. 203, Rinfret J. stated (at p. 209):

Judgments maintaining demurrers, in whole or in part, are not analogous. If the demurrer be to the whole action and if it be maintained, the action is dismissed and cadit questio. In all other cases, the allegations struck out upon demurrer disappear from the record and no evidence whatever can be adduced in respect thereof at the trial. The trial judge is therefore powerless, and any attempt by him to remedy the situation by the final judgment would be ineffective and inoperative. The result is that judgments on demurrers striking out part of the allegations stand in a class by themselves and must be treated as final judgments. [Emphasis added.]

In support, he relied on two earlier decisions of this Court, Dominion Textile Co. v. Skaife, [1926] S.C.R. 310, and Ville de St. Jean v. Molleur (1908), 40 S.C.R. 139. More recently, this rule was set out in Fraternité des Policiers de la Communauté urbaine de Montréal v. City of Montreal, [1980] 1 S.C.R. 740, and reiterated in Brandt Plumbing Co. v. Nozetz, [1984] R.D.J. 219 (C.A.).

I conclude from these authorities that judgments which allow motions for non-suit and strike conclusions are final or definitive judgments and must be appealed within the prescribed delay in order to prevent them from becoming res judicata on the point.

There is, however, authority for the proposition that some such "final" judgments, limited in the case law to decisions maintaining an objection to the evidence, may be appealed within the context of a wider appeal from the judgment on the merits in certain circumstances. For a very cogent history of this development, see Laforge v. White, [1990] R.J.Q. 2124 (C.A.). However, in that case, Rousseau-Houle J.A. makes the following qualifications (at p. 2127):

[translation] In the case of interlocutory judgments allowing an objection to evidence, however, this Court noted in Brûlé v. C.S.R. de Chambly, [[1984] R.D.J. 478], that the fact that the right of appeal was not exercised immediately after the decision did not raise a presumption that this right of appeal had been waived, and that even if the trial had been concluded, the application for leave to appeal could be granted because it had been made within 30 days of the judgment. In Droit de la famille -- 229, [[1985] C.A. 487], although LeBel and Turgeon JJ. dismissed the interlocutory appeals filed during the trial of a divorce action, they nonetheless considered that such appeals could be heard, since the Court of Appeal now seems to acknowledge that, under art. 29 C.C.P., an immediate appeal during a trial is possible in some cases without in any way being obligatory.

The solution of appealing immediately following an interlocutory judgment allowing an objection to the evidence increases the risk of reopening the trial solely to obtain additional evidence. This inconvenience must not deprive a party of the opportunity to appeal from such a judgment when, at the very least, as in the case at bar, the delay allowed for obtaining leave to appeal had not elapsed when the final judgment was rendered, and that judgment put into question the correctness of the interlocutory judgment to which it was still connected in law. [Emphasis added.]

Hence, the right to appeal from a final, albeit "interlocutory", judgment within the context of an appeal of the judgment on the merits is restricted to cases in which the judgment on the merits has been rendered before the delay in which the interlocutory decision could be appealed has elapsed. The judgment on the merits must also put into question the correctness of such "interlocutory" judgment. Even assuming that there is no distinction to be made between judgments which strike conclusions and those which simply allow objections to the evidence, and that, in this case, the judgment on the motion was "juridiquement lié" to the judgment on the merits, Garcia's appeal from the motion of non-suit would be prescribed, since the decision on the motion was made on May 27, 1985 (corrected July 9), the judgment on the merits was rendered on February 10, 1986, and the appeal was lodged on March 10, 1986.

In summary, then, since the trial judge's decision granting the Bank's preliminary motion constituted a final judgment on the point and was not appealed within the prescribed delay, either independently or within the context of the appeal from the decision on the merits, that judgment constituted res judicata, as Vallerand J.A. in dissent correctly concluded. Garcia could not then relitigate the matter and seek, as it did on appeal, the vacating of the second sheriff's sale, even if it may have had the right to succeed on that claim, a right which, as I concluded earlier, it did not have in any event.

Garcia, however, also claimed its release retroactive to the time after the first sheriff's sale, a matter I will now discuss.

2. The Discharge

While courts have given a large and liberal interpretation to the remedial provisions of arts. 1202a et seq. C.C.L.C., allowing the debtor to obtain its release upon certain conditions, they have also recognized that these dispositions only apply in particular circumstances, carefully described and circumscribed by the provisions themselves. Moreover, the law does not provide for the release to be granted automatically, but rather leaves it to the debtor to claim it (arts. 1202h and 1202i). If a debtor fails to seek such release within the time limits set out in art. 1202l, his or her right to do so lapses. Similarly, if the debtor fails to adopt the proper procedure, although within the prescribed delay, the protection to which he or she might otherwise be entitled under these provisions may be curtailed.

For example, in Lafaille v. Banque nationale du Canada, [1987] R.J.Q. 1509, the creditor bought property subject to a hypothec in its favour at a sheriff's sale. After the bank had resold the property at a loss, the debtors sought a declaration under art. 1202e C.C.L.C. They claimed that their debt should be reduced by the amount the bank paid for it, rather than the lower price for which it resold it. Nichols J.A. for the Court of Appeal rejected this argument at p. 1517:

[translation] If the articles had to be interpreted as the appellants propose, that is, to mean that the hypothecary debtor is entirely at liberty to make its application for release at such time as he or she deems appropriate, while retaining the choice of remedies, in my view this would give these measures a broader remedial effect than what was actually contemplated. This interpretation would be likely to cause still greater damage to a creditor acting in good faith.

In a way, this would put the creditor at the mercy of the debtor, as I stated earlier. [Emphasis added.]

The application of these principles led him to conclude at p. 1514:

[translation] There is nothing to prevent the appellants from making their application for release as part of their defence to the creditor's action, but we cannot ignore the fact that they awaited the resale of the immoveable before making their application for release. As a point of fact, the resale took place on April 16, 1981, one month before their pleading. Were they hoping that the bank would be able to resell the immoveable at a price that would be sufficient to release them in full? I do not know. However, if they had wanted to enjoy the privilege granted by paragraph (a)

of art. 1202b, they should have filed their application for release before the immoveable was resold. Having allowed this event to go by, they must now live with the situation. [Emphasis added.]

Placements Monga Inc. v. Lalonde, [1986] R.L. 264 (C.A.), also illustrates the fact that it is up to the debtor to act diligently in order to benefit from the full protection of arts. 1202a et seq. C.C.L.C. The appellant company and the respondent Lalonde were co-guarantors of a loan. After the borrower defaulted, an immoveable belonging to the company, which it had hypothecated to guarantee the debt, was sold to the lender in a sheriff's sale for an amount far below its actual value. The company took action against Lalonde under art. 1955 C.C.L.C., which provides that guarantors are liable for their share of the amounts which their co-guarantors pay in satisfaction of a debt. The Court of Appeal upheld the Superior Court's ruling that the company was only entitled to Lalonde's share of the price paid by the lender at the sheriff's sale, not a proportion of the actual value of the immoveable. Bisson J.A. wrote at pp. 275-76:

[translation] The appellant complains that the judge stated that before the appellant could exercise a recourse against its co-sureties, it must necessarily have availed itself of under the provisions of the Civil Code concerning "the discharge of certain debtors".

If the appellant had obtained its release, the co-sureties would have been released and the appellant could then have proceeded against them.

Arts. 1202a et seq. were enacted to counter the damaging effect caused by the sale at law of immoveables for a price lower than their market value.

However, the appellant would still have had to apply to the Superior Court under art. 1202h.

As it had not done so at the time of the judgment a quo, the judge was correct in so noting. [Emphasis added.]

See also Interprovincial Building Credits Ltd. v. Pelletier, [1970] C.S. 94.

Accordingly, while arts. 1202a et seq. C.C.L.C. are remedial provisions which must be afforded a large and liberal interpretation, the right to be discharged is not an absolute right. The debtor must exercise the right, must do so in timely fashion, and must follow the proper procedure.

As previously stated, none of the provisions at arts. 1202a et seq. C.C.L.C. explicitly addresses the question of discharge when more than one sale at law has taken place. However, the legislator clearly anticipated that some debts would be secured with more than one instrument or property. For example, the first paragraph of art. 1202i C.C.L.C. provides that the "release of the principal debtor entails the release of his sureties and warrantors". Faribault, supra, noted that art. 1202i would also apply where a debtor had pledged more than one piece of property to secure a loan (at pp. 651-52):

[translation] The discharge of the debtor necessarily results in the extinction of the debt and, at common law, such extinction also entails the release of the sureties and warrantors from liability, since the accessory cannot survive the principal.

This article in no way deals with privileges or hypothecs which have been discharged by the sheriff's sale. It applies only if the debtor has given his or her creditor other security, such as a surety provided by a third party, or an additional hypothec given on an immoveable other than the one which was sold. All these warranties disappear when the debtor is discharged. [Emphasis added.]

However, as the terms of art. 1202i itself make plain, the additional securities granted by the debtor to its creditor do not disappear unless the debtor actually seeks and obtains its discharge before the courts. The second paragraph is couched in facultative rather than imperative language:

When a debtor has, in virtue of this division, the right to obtain his release with respect to a debt or residue of a debt, any person who has become surety or warrantor for the payment of such debt or such residue has the right to obtain his own release and may exercise his recourse for such purpose, independently of the principal debtor, by following the procedure hereinabove set forth. [Emphasis added.]

According to this provision, even sureties and warrantors acquire only a right to apply for a discharge, which they must exercise positively according to the procedure set forth earlier in the section in order to be released. It follows that a debtor who has hypothecated more than one piece of land to secure a single loan must also take positive steps to obtain discharge after a first sale at law, in order to prevent its creditor from enforcing its rights with respect to other securities associated with the same debt. Even when the value of a property sold at a first sheriff's sale is sufficient to satisfy the balance of the debt owing to its creditor, a creditor is not prevented from forcing the sale of other property pledged by the debtor. The law does not provide for automatic discharge upon the sale of sufficient assets to satisfy the debt. Rather, it sets out the procedure to be followed by the debtor within a specified delay to claim such release.

That procedure whereby a debtor may prevent a second sale, if entitled to discharge after the first sale, is set out in art. 1202j which, for ease of reference, I reproduce here:

1202j. The debtor may, in so far as his recourse for release is not prescribed, invoke as a defence to a suit, as an opposition to a seizure in execution or as a contestation of a seizure by garnishment, as the case may be, the grounds which he may invoke in support of an application for release, and, upon conclusions to that effect in the said defence, opposition or contestation, the court may award the release. [Emphasis added.]

Faribault, supra, comments (at pp. 652-53):

[translation] By this article, the legislature permits the debtor to invoke his or her grounds in support of release, not only by an introductory notice of motion, but also in pleadings in an action by the creditor to claim the residue of the claim, and even by means of an opposition to a seizure in execution or a dispute of a seizure by garnishment.

It is clear that Garcia could have prevented or at least delayed the second sheriff's sale, simply by following the procedure set out in art. 1202j C.C.L.C. before it took place. As the Bank points out, according to art. 599 C.C.P., which I have reproduced at the outset of these reasons, Garcia's opposition to the seizure in execution would have automatically suspended the sale of its property pending the determination of its right to a discharge following the first sale. Evidence could then have been led as to the value of the property sold at the first sheriff's sale, in order to establish whether it was sufficient to satisfy the debt owed to the Bank.

Time is, however, of the essence. As Nichols J.A. observed in Lafaille, supra, a debtor must act diligently if it wishes to avail itself of the rights conferred in arts. 1202a et seq. C.C.L.C. If the debtor stands idly by while other legal proceedings, such as the resale of the property or a second judicial sale, take place, courts will not remedy this inaction. To borrow the phraseology used by Nichols J.A.: [translation] "Having allowed this event to go by, they must now live with the situation."

Article 1202k C.C.L.C. buttresses this conclusion:

1202k. The release of the debtor shall not have the effect of compelling the creditor to remit any sums which he legally collected under his judgment before such release.

This seems a clear indication that once the judgment has been fully executed, as here by the second sale at law, although the debtor can still obtain its release (provided the value of the property is sufficient to cover the debt), it cannot claim the amount which may have been a windfall to the creditor and to which it may otherwise have been entitled. While the legislator did foresee the possibility that a sheriff's sale could trigger a debtor's release with respect to more than one security, as set out in art. 1202i C.C.L.C., at the same time it restricted that right in such a way that a debtor who does not exercise a claim diligently does so at his or her own peril.

This conclusion is consonant not only with common sense, but with the respect for the titles accorded by sheriff's sales inherent in Quebec law, and its restrictive approach towards the vacating of such sales when the petitioner fails to oppose it before it takes place, as I discussed earlier. It is also consistent with the desire to avoid prejudice to a creditor who acted legally and was not notified in due time of its debtor's intent.

Having failed to claim its release before the second sheriff's sale took place, as it could have done by following the procedure set out above, Garcia was barred both from seeking its release and obtaining reimbursement from the Bank, as well as from claiming the vacating of the second sheriff's sale. While this may seem harsh at first sight, there are valid policy reasons, tied to the impact of sheriff's sales on titles, which may have guided the legislator in its choice of remedies. While it might be appropriate to facilitate split sales when advantageous to the debtor and

without prejudice to the creditor, it is up to the legislator, not to the courts, to enact legislation to this effect (as I stated earlier).

Conclusion

In conclusion, while Garcia could have availed itself of the remedial provisions of arts. 1202a et seq. C.C.L.C. in order to obtain its release after the first sheriff's sale, it could only do so by adopting the proper procedure within the prescribed delay before a second sheriff's sale proceeded. While its waiver of the benefits of the law was null as premature and contrary to the economic protective public order provisions of arts. 1202a et seq. C.C.L.C., its failure to observe the procedural requirements to avail itself of its rights is fatal, and its claim must fail.

Moreover, as regards Garcia's claim to vacate the second sheriff's sale, having failed to appeal in due time the trial judge's judgment on the Bank's motion to strike, there was res judicata on this issue and Garcia was barred from relitigating this point on appeal. In any event, Garcia neither alleged any of the grounds required to have the second sheriff's sale set aside nor did it provide any evidence of illegality or irregularity in this connection. Its claim to vacate the second sheriff's sale must also fail.

Given the circumstances of this case, and in particular the fact that the Bank's judgment was satisfied as a result of the first sheriff's sale, I would not grant costs.

Accordingly, I would allow the appeal, reverse the judgment of the Court of Appeal and dismiss the respondent's action, the whole without costs throughout.

Appeal allowed.

Solicitors for the appellants: de Granpré, Godin, Montréal.

Solicitors for the respondent: Paquette, Perreault, Trudeau & Associés, Montréal.

* Stevenson J. took no part in the judgment.

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